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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 | ) ) ) | MM Docket No. 93-215 |
| Rate Regulation | ) ) ) | |

COMMENTS OF TELE-COMMUNICATIONS, INC.

Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Its Attorneys

August 25, 1993

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ATTACHMENT A. Dr. Stanley M. Besen and Dr. John R. Woodbury, "An Analysis of the FCC's Proposed Cable Cost-of-Service Backstop," August 24, 1993.

ATTACHMENT B. Statement of Financial Accounting Standards Nos. 71 and 82.

**SUMMARY**

TCI supports the Commission's goal to formulate cost-of-service standards that "form a 'backstop' to the benchmark approach to rate regulation" and do not replicate traditional Title II regulation. A cost-of-service backstop will address the imprecision of the averaged rate measures incorporated into the benchmark by providing an alternative regulatory scheme for high-cost systems. In establishing this safety net, TCI urges the Commission to eschew broad averaging and allow high-cost cable systems to make individualized cost-of-service showings to justify rates that exceed the benchmark.

The proposals found in the Notice, lifted largely from telephone company regulation, do not accomplish this. Rather than copy telephone regulations and blindly apply them and their accompanying burdens to cable -- a heterogenous industry that has developed in a substantially different manner than the telephone industry -- the Commission here must set out streamlined cost-of-service alternatives and improvements upon the benchmark approach that cable systems can implement to justify their high costs without prejudice or unnecessary expense. The application of these rules should be limited to those cable systems wishing to take advantage of the cost-of-service alterative, and not burden the industry as a whole.

In designing such a backstop for high-cost cable systems, TCI urges the Commission to implement an <u>ad hoc</u>, individualized regulatory scheme. As TCI sets out in detail below, an <u>ad hoc</u>

approach is appropriate for several reasons: (1) it does not impose unnecessary expense on the entire cable industry by forcing all operators to implement overly burdensome cost-of-service requirements; (2) it avoids the problems inherent in imprecise industry averaging from which the current benchmark system suffers; and (3) it is administratively workable for the few operators that will opt to proceed with cost-of-service showings.

In addition, an ad hoc approach would not force all cable operators to implement costly accounting rules reserved for rate-of-return regulated industries, nor require industry-wide depreciation rates or rates-of-return. These types of traditional cost-of-service regulations with uniform applicability would needlessly burden the entire industry when only a minority of operators will elect to submit cost-of-service showings. Moreover, the cable industry is too heterogenous to support comprehensive decisions on cable industry costs, depreciation rates, rates-of-return, or other components of traditional cost-of-service showings. Sweeping cost-of-service regulations that are based on such fundamentally imprecise averaging techniques will defeat the Commission's goal of creating a "backstop." Since fully informed cable regulation can only be achieved after considerably greater effort through additional rulemakings, case-by-case adjudications, and industry studies, an ad hoc, individualized approach is appropriate now. Over time, through ad hoc determinations, further industry studies and rulemakings, the Commission may be able to form certain generic opinions or create parameters for cable industry cost-of-service showings. Until that time, the Commission must allow companies to submit individual cost-of-service showings.

The problems inherent in simply borrowing traditional rate-of-return regulation from the telephone industry are further illustrated by the Notice's suggestion that a productivity offset be applied to cable. This suggestion is wholly inappropriate. The Commission has no reason to believe that the cable industry's productivity departs from the economy as a whole or that an offset will be necessary after the industry is subject to regulation. A productivity offset should not be applied to cable.

Given the complexities and inefficiencies of cost-of-service regulation, the Commission should also consider streamlined alternatives to its regulatory scheme. In the attached paper, Dr. Stanley M. Besen and John R. Woodbury of Charles River Associates, Inc., suggest that the Commission permit "high cost" factors to be used to justify rates in excess of the benchmarks. As a full-blown cost-of-service proceeding will be unnecessary in most situations to account for high cost factors, the Commission will preserve valuable resources by permitting cable operators to document key cost factors that justify existing rates without incurring the expense of a cost-of-service showing.

TCI agrees with the Commission that a cable operator's reasonable operating expenses should be recoverable under the cost-of-service rules. The risk inherent in contracting for programming similarly should be recoverable. To accommodate this programming risk, TCI urges the Commission to make clear that programming costs may be expensed with a mark-up.

In addition, the Commission should not disallow recovery of excess acquisition costs. These costs represent anticipated economies and should be recoverable. Also, the Commission's proposal to depart from a general rule permitting the recovery of income taxes based on whether the cable system is operated by a Subchapter S corporation or a partnership is not supported by law.

In sum, the full-blown cost-of-service regulations proposed in the Notice are not required here. Rather, a streamlined backstop that permits high-cost cable operators to demonstrate that their unique circumstances justify departure from the benchmark is more appropriate.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, files these comments in response to the Notice of Proposed Rulemaking in the above-captioned docket to establish standards for cost-of-service showings by cable companies.[1]

## INTRODUCTION

The stated goal of this proceeding is to formulate cost-of-service procedures to "form a 'backstop' for the benchmark approach to rate regulation." Notice at ¶ 7. The Commission has further assured the public that: "our cost-of-service requirements will not replicate Title II regulation." Id. at n. 16. TCI fully supports these stated goals for, and limitations upon, the development of cost-of-service rules for cable rate regulation.

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[1] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 93-215, Notice of Proposed Rulemaking on Cost-of-Service Regulation, FCC 93-353 (released July 16, 1993) (the "Notice").

Unfortunately, however, the actual proposals of the Notice quickly lose sight of the stated objectives. In lieu of narrowly designed rules to account for the special cases of high cost cable systems, that is, those systems for which benchmarks will not equitably work, the Notice proposes general rules that are largely lifted from telephone company regulation, and which would apparently apply to all regulated cable companies.

No doubt, some of this effort stems from an understandable impulse to return to what the FCC does know, after nearly 60 years of telephone regulation. But the FCC lacks sufficient knowledge of, experience with, and information about the cable industry with respect to the issues raised in the Notice, which is not surprising since it was only recently that the FCC was forced to be concerned with such matters. TCI has attempted to provide the Commission with concrete examples of industry differences that require specific and unique rules and policies. TCI respectfully submits that informed cable regulation can only be achieved after considerably greater effort through additional rulemakings, case-by-case adjudications, and industry studies. Moreover, these efforts should not result in industry-wide requirements, such as general cost allocation rules or depreciation schedules, since cost-of-service regulation is intended to apply only in unusual cases. Because cost-of-service regulation is to serve exclusively as an exception to the general benchmark approach, the data-gathering effort must be carefully and narrowly tailored to this limited purpose.

TCI believes that the optimal way to assure that the extraordinary costs of "traditional" cost-of-service, i.e., rate-of-return, regulation do not overwhelm Commission and industry resources is to devise streamlined cost-of-service alternatives and improvements upon the benchmark approach. The current benchmark approach suffers not only from averaging the circumstances of a large number of disparate systems, but also in failing to allow for the necessary capital for upgrades that will permit the cable industry to contribute fully to the national telecommunications infrastructure. In Section VII, as well as in the attached paper by Dr. Stanley M. Besen and Dr. John R. Woodbury,[2] proposed alternatives to full-blown cost-of-service adjudications are discussed in full. These alternatives, most especially a "benchmark plus" approach, hold far greater promise of efficiently and expeditiously achieving the Commission's objective of providing regulatory relief to high cost systems than does the approach proposed in the Notice.

## I. COST-OF-SERVICE RATEMAKING SHOULD BE RESERVED SOLELY AS A SECONDARY MEANS OF CABLE RATE REGULATION

The Notice begins with a general discussion of the role of cost-of-service regulation in the overall scheme for cable rate regulation. It appropriately recognizes the secondary role that cost-of-service regulation must play in determining cable rates. This context is critical to the Commission's analysis and

[2] S. Besen and J. Woodbury, "An Analysis of the FCC's Proposed Cable Cost-of-Service Backstop," August 24, 1993.

evaluation of each specific element of cost-of-service regulation relative to the cable industry.

Congress expressly forbade traditional cost-of-service regulation as the primary method of regulating the rates of cable systems.[3] Recognizing this prohibition, the Commission adopted a "competitive benchmark" to regulate most cable companies' rates. Notice at ¶ 4. The instant Notice was developed exclusively as a safety net for those companies for which benchmark regulation would be inequitable, or even confiscatory. Id. at ¶ 5.

In seeking to avoid the rigidity of traditional utility ratemaking, especially in the context of an industry as heterogeneous as cable, an averaged rate measure was employed in deriving the benchmarks. With the use of a large degree of averaging, many "misses" were inherent in the benchmark approach. This was justified by providing an opportunity for individual cable operators to show that, in particular instances, application of the benchmarks worked inequities unintended by the Congress and in some cases even forbidden by the Constitution.

The weaving of this cost-of-service safety net is without doubt a complex and arduous process. Despite this level of difficulty and complexity, however, the Notice proposes shortcuts that cannot now be justified without more familiarity and experience with cable industry operations and practices. A reasoned process is required if cost-of-service is to provide the intended degree of protection.

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[3] 47 U.S.C. § 541(c).

The collection of the extensive data needed for this process cannot be achieved by a single rulemaking. It is understandable that the FCC lacks specific cable industry information with respect to the issues identified in the Notice since until now the Commission had no reason to acquire this information. For many issues raised in the Notice, general rules cannot be established without a far more comprehensive understanding of how the industry operates and what the full implications of various regulatory choices may be.

Some of the issues may be resolvable through additional rulemaking proceedings; many will best be addressed through case-by-case adjudications. While this process creates a distinct level of uncertainty, it is far preferable to the adoption of known rules that would diminish consumer welfare. The absence of decisions will be better than arbitrary ones.

As discussed below, the Commission's development of cost-of-service standards, to be true to their limited role as exclusively a "safety net", must: (1) avoid application to the entire cable industry; (2) eschew broad averaging; and (3) not penalize cable operators that are economically forced to elect cost-of-service hearings.

### A. The Commission Must Ensure that the Limited Use of Cost-of-Service Regulation Does Not Adversely Affect the Entire Industry.

In setting forth a regulatory scheme modelled upon traditional public utility regulation, the Commission is borrowing concepts used (and universally criticized) for mature, generally static industries. Its application to more dynamic industries, such as telephony, has been something the Commission has tried intensely to avoid for many years.[4] This movement away from traditional cost-of-service regulation, which TCI fully supports, suggests that it may not be the best way to encourage competition.

The Commission has attempted to circumvent the legal implications of adopting a common carrier scheme for cable television by correctly insisting that it is solely a "backstop." Notice at n. 16. Notwithstanding this all-important qualification, the Notice proposes a large number of rules, which cumulatively would impose much of the public utility regulatory apparatus upon the entire cable industry. The construction of this backstop thus begins to look more like a cage in which all efficiency-producing incentives will be sapped. General rules with industry-wide application, such as prescribed depreciation methodologies, cost allocation rules, and performance measures based on profits, would themselves drain the energies of the industry. For this reason, the Commission must be exceptionally cautious to assure that it does not craft an Order of industry-wide applicability. Like any other business subject to general price controls, participants in the cable industry should be free to show why the benchmark rates are inapplicable to them. But

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[4] See, e.g., Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873 (1989) ("AT&T Price Cap Order"); 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) ("LEC Price Cap Order").

absent such election, the remaining cable systems should not be saddled with all of the requirements of rate-of-return regulation.

Further, the long-documented imperfections of ratebase regulation are all the more in evidence when attempted in the context of activity protected by the First Amendment. Traditional concepts employed in the utility field to measure the performance of the regulated entity are wholly inapt here. Whereas the FCC may measure the percentage of "call attempts" to assess the quality of telephone service, is the Commission to sit in judgment of the quality of programming offered by cable companies? Because it can in no way consistent with the First Amendment attempt to make such judgments, the Commission must be especially careful not to create regulatory incentives that would induce reductions in program quality.[5]

It is imperative that the Commission understand the full impact of its proposed regulatory scheme. In October, 1992, TCI received full investment grade status by all accredited rating agencies. Such ratings, by opening access to additional credit markets, add to the Company's ability to sell publicly greater amounts of fixed-rate debt securities with longer maturities. The increased maturities of these securities, and the associated decrease in bank borrowings, are expected to

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[5] Certain aspects of cable service may in fact permit such objective measures, that is, customer service. Congress' solution here was to regulate that aspect of cable directly.

improve the Company's liquidity due to decreased principal payments required in the next five years.[6]

TCI estimates that implementation of the new benchmark rates will result in a reduction in revenue and pretax earnings ranging from $140 million to $160 million annually.[7] This rate rollback will place the Company in technical default of six loan covenants. The full extent to which cost-of-service regulation will have an impact on TCI's financial condition cannot be predicted until this proceeding is completed. But ultimately, the Company believes that the new rate regulations, when implemented, will have a material adverse effect on its net earnings and cash flow.[8] This, in turn, will increase the cost of capital to TCI.

The deterioration of TCI's financial condition that will result from the Commission's proposed regulatory approach is especially harmful given that the Company is rebuilding its cable system with optical fiber. TCI plans to invest $2 billion in the next four years so that it will be serving the majority of its customers with state-of-the-art fiber optic cable systems. As a result, the Company has increased its capital budget for 1993 to $750 million to provide for the initial phases of rebuilding its

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[6] TCI 1992 Form 10-K.

[7] TCI June 30, 1993 Form 10-Q.

[8] Such material adverse financial effects may further result in technical defaults in other credit agreements and loss of its investment grade status.

cable systems.[9] Any actions by the Commission that would thwart or impede such technological progress is inconsistent with and contrary to the Cable Act.[10]

### B. Broad Averaging Cannot Be Used If Cost-of-Service Showings Are to Effectively Serve as "Backstops."

The FCC employs industry-wide rules and a high degree of averaging in its rate regulation of the telephone industry, and proposes to adopt analogously generic rules for the cable industry. Reliance upon the telephone regulatory model is, however, highly misplaced because of industry specific differences. While the desire to minimize the "complex and resources intensive"[11] aspects of ratebase regulation is laudable, these are inevitable parts of the process of determining cost-based rates. The use of broad averaging and rules of industry-wide application is appropriate for telephony; it is firmly based in the history of the telephone business itself. It is justified in the case of telephony; it is untenable for cable.

From the 1920s until 1984, the Bell System enjoyed a dominant position in the telephone industry. As a result of this unquestionable leadership, the supply of telephony within the U.S. was fully integrated and coordinated in virtually all aspects -- operationally, financially and technically.

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[9] TCI 1992 Form 10-K.

[10] See 47 U.S.C. § 521(2).

[11] Notice at ¶ 12.

The presence of the Bell System ensured a fully coordinated establishment and operation of the nationwide telephone network. Bell Labs provided the design; Western Electric provided the equipment; the Bell companies constructed and operated local telephone facilities; and AT&T Long Lines constructed and operated the integrated long distance network. Through its ownership of nearly 80% of the industry and the device of "License Contracts" and other supply contracts, AT&T fully integrated and centralized all of the management, technical, administrative, and financial operations of the Bell companies.

Further, even though independently owned, all telephone companies were economically integrated with respect to their joint provisioning of interstate services through the Separations and Settlements process, which established the division of interstate revenues for the industry. The pervasiveness of cross-licensing of patents and other contractual arrangements served to solidify the Bell System with the remainder of the telephone industry. The commonality of system design, service provisioning and financial practices that arose as a result of all of these arrangements is thus unremarkable. Most significantly, this commonality permitted, and continues to permit today, a generalized approach to rate regulation by the FCC.

The use of regulatory "shortcuts" in this environment was an affordable luxury. Telephone company costs were historically broadly averaged, but pervasive revenue sharing arrangements within the industry made this regulatory practice inconsequential. Pooling arrangements established through the Commission's access charge scheme continue today to achieve a fair degree of economic integration in the local telephone industry's provision of interstate services. Further, the need for interoperability of all segments of the nationwide telephone network, as well as a social policy in favor of nationwide averaging of interstate telephone prices, give a certain logic to broad cost averaging, especially given the externalities inherent in telephony. It was only upon the introduction of competition into select segments of the telephone business that broad averaging began to show its flaws, that "true" costs became relevant, and arguments over "subsidies" ensued.[12]

The history of the cable television industry could not be more disparate. From its inception as solely a means of retransmitting broadcast signals, the cable industry has been characterized by a widely diverse and unconcentrated collection of entrepreneurs and companies. Even those who have attacked the more recent consolidation of cable companies do not quarrel with the proposition that substantial portions of the country are served by thousands of cable systems reflecting distinct operations -- financially and operationally. Free of regulatory constraints, or a single industry leader, such as pre-divestiture

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[12] See Federal Perspectives on Access Charge Reform, A Staff Analysis, released April 30, 1993.

AT&T, serving to coordinate individual company practices, cable systems have grown and developed through a wide variety of engineering, management and financial practices. They offer widely divergent sets of services, both regulated and unregulated, and have obtained and reinvested their capital in numerous ways -- some are sole proprietorships and some are owned by Fortune 500 companies, integrated into a vast array of related and unrelated businesses. Cable systems historically have not been interconnected and thus the degree of uniformity required of telephone company operations has no counterpart in the cable industry.

While plainly patterns of technical operations have developed over the years as individual cable companies successfully proved out particular approaches, that process is still very much underway, as the various strategies and timetables for fiber deployment and digital compression demonstrate. But the identity and similarity of systems design and engineering, financial and accounting practices, and equipment purchases and deployment that characterize the telephone industry is nowhere in evidence in the cable business. "One size fits all" regulation simply will not work here.

Moreover, as explained in the attached paper by Drs. Besen and Woodbury, the use of broad averages is inconsistent with the very purpose of a "backstop" approach:

> Since rates for competitive systems are presumably determined by their costs, a showing that rates should not be limited by the benchmarks thus requires evidence that a

> system's costs exceed those of an average system. This means . . . that a presumption that some element of a system's costs conforms to an industry average is inconsistent with the purpose of the cost-of-service backstop. Thus, for example, specifying an allowed rate of return based on an estimate of the average cost of capital for the cable industry would be incompatible with the use of cost-of-service regulation as a backstop. . . . Under the Commission's approach, a system must be afforded an opportunity to demonstrate that its cost of capital is different from the industry average, and there should be no presumption that it is not.

Besen and Woodbury at 3 (footnote omitted). The very reason for a cost-of-service alternative is to allow individual operators to attempt to show that their costs exceed the industry average. The use of FCC-specified industry averages in cost-of-service proceedings is contrary to the objective of permitting cable operators to demonstrate unique circumstances or extraordinary costs.

### C. Cable Operators Cannot Be Penalized for Electing Cost-of-Service Hearings.

The Notice seeks comment on how to avoid an overwhelming number of cost-of-service elections. Notice at ¶¶ 17-18. The simple answer is to correct the patent flaws in the benchmark system of regulation, as sought by several parties on reconsideration, and further, to consider streamlining alternatives as discussed in Section VII, *infra*. Beyond that, there is very little the Commission need or can do to discourage cost-of-service elections.

First, TCI believes that cable operators will not engage in cost-of-service regulation unless its cost structure will not allow a fair return on its investment. Recognizing that cost-of-service regulation permits the potential for governmental second-guessing of virtually every business judgment made by the regulated firm, that it is exceptionally costly, and that it has far-reaching implications for future conduct of the business, the process of cost-based regulation is its own best deterrent. Not surprisingly, TCI has already stated publicly that it will seek cost-of-service hearings for only a small number of systems. Currently, TCI has approximately 4400 franchise operations throughout the United States, with over 10 million subscribers. Based on the original benchmark scheme, TCI believes that it will need to file cost-of-service showings for only a handful of its systems. These systems exhibit cost structures that TCI believes should be afforded cost-of-service treatment.

The Notice's effort to set penalties for those cable operators forced to elect cost-of-service showings is counter to the raison d'etre of the election's availability. Specifically, the proposal to preclude cost-based rates at levels in excess of existing prices is by definition confiscatory. See Notice at ¶ 18. The prices set in an unregulated market can, of course, generally be presumed to be set at (or above) cost, but the regulation does not reach the full bundle of cable services and goods that comprise cable service. The Commission has already recognized that the prices of certain services, most especially installation, are not in fact set at cost. Regulation will necessarily require repricing and restructuring; given this, it should not be surprising that existing rates cannot legitimately serve as any cap.

Further, the proposal is ill-considered in light of the fact that the Commission's rate freeze order has been effective since early April. Costs have indeed increased since that time, and certainly can be expected to continue to rise between now and the time at which cost-of-service hearings are held. Additionally, the general structure of the rate regulation scheme contemplates that cost-of-service hearings may be elected when an operator seeks to increase its rates to levels in excess of the benchmarks and price cap adjustments. This structure is at odds with a rule that automatically disallows rate increases before the hearing begins.

In the same vein, the Commission's evaluation of specific issues in, and elements of, cost-of-service regulation should not be made with the traditional calculus of whether the methods employed satisfy Fifth Amendment concepts of "takings." The Notice correctly expresses concern that the proposed regulation not impair cable's current and future role in the national telecommunications infrastructure. Regulation, short of that which constitutes confiscation, will deprive consumers of the valuable contributions that cable companies would otherwise make in offering new services, and in providing cable and other services over enhanced infrastructures. "In fact, consumers may ultimately be harmed by a balancing of interests that unnecessarily weighs in their favor." See Note, "Takings Clause Analysis of Utility Ratemaking Decisions: Measuring Hope's Investor Interest Test," 58 Fordham L. Rev. 427, 442 (1989) (citing Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276, 308 (1923)) (Brandeis, J. concurring). By increasing regulatory risk, regulators may ultimately raise the cost-of-capital; the scarcity of reasonably priced capital will ultimately result in service deterioration. Id. at 443.

The Notice expressly acknowledges that its proposed regulatory scheme should not impede future technological progress and service innovation by cable operators. The welfare loss threatened here will be severe, and will not be limited to those borne by the cable industry. Thus, for example, in considering the allowable return on capital for cable companies, the Commission should attempt to achieve not the lowest, non-confiscatory rate, but rather to permit a range of rates fair to both cable subscribers today and consumers tomorrow.

## II. THE NOTICE'S PROPOSALS REGARDING FORMATION OF THE PERMITTED RATEBASE MUST BE REVISED

The Notice raises a variety of issues regarding the rules governing inclusion and valuation of ratebase items. Given the wide variance of cable system characteristics, TCI respectfully submits that a priori rules governing the regulated ratebase cannot be established here. Special rules, adapted to the cable industry, and reflecting adjustments to traditional ratemaking rules, will need to be developed. Because of their primary importance, TCI below confines specific discussion to the treatment of "excess" acquisition costs, depreciation and accumulated operating losses.

### A. A General Rule Disallowing Any Return on Excess Acquisition Costs Would Be Illegal.

The Notice proposes to exclude from the ratebase, by general rule, all "excess acquisition costs," that is, the costs of acquisitions in excess of the original cost of the assets acquired. This general rule cannot be sustained, either practically or legally. First, as a practical matter, original cost will often not be ascertainable. Records establishing the original cost of cable plant incurred by prior owners have not often been kept post-acquisition.[13] Some surrogate would have to be utilized, even if the Commission were to try to proceed on this basis.

[13] Typically when an acquisition is made, the purchaser will cause an appraisal study of the system to be made. This study, usually conducted by an engineering consulting firm, will value the tangible assets. The difference between the purchase price and the appraisal value of these assets will be assigned to numerous intangibles. The appraisal value of the tangible assets may also be used for property tax liability computations.

The value of the assets at the time of appraisal will reflect the actual age and remaining life expectancy of the plant being purchased, and will also reflect any improvements made since the plant was originally constructed, for example, operating efficiencies subsequently achieved through clustering, etc. This could serve as a proxy for "original cost" of the hard assets; the policy problem of subtracting out "monopoly rent expectations," if any, from the intangibles will remain unsolved by this, however.

There is no small irony to this. The initial "fair value" approach to ratebase asset valuation was abandoned precisely because original cost, for utilities already subject to regulation and in industries rarely experiencing mergers and acquisitions, was a far more practical, readily workable approach. See Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Stephen Breyer, Regulation and its Reform at 38-39 (1982). The rationale for the general historical trend in utility ratemaking to utilize original cost valuation thus does not obtain here.

As a legal matter, the Commission cannot simply prejudge the validity of including acquisition costs in the ratebase. It cannot a priori determine that any and all acquisition costs above a regulatory construct are necessarily "imprudent." Acquisitions are made for a variety of reasons, and yield benefits to both investors and to subscribers in a variety of ways. Like any other private decisionmaking, the management decisions of cable companies to consolidate are presumed to be rational and profit-maximizing. Thus, for example, a cable company may acquire neighboring systems to capture efficiencies from "clustered" operations. "Excess" acquisition costs thus will often fairly reflect these efficiencies, rather than payment for expected monopoly rents. More generally, as Drs. Besen and Woodbury observe in their paper:

> [I]n a competitive industry, prices will contain a normal return on all capital costs, including the costs of acquiring intangible capital . . . . Similarly, the purchaser of